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STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

BRIEF IN REPLY TO NORTH CAROLINA'S EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

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BRIEF IN REPLY TO NORTH CAROLINA'S EXCEPTIONS TO THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL MASTER

INTRODUCTION

North Carolina raises two exceptions to the Special Master's reports.

First, it argues that the Southeast Interstate Low-Level Radioactive Waste Management Commission ("the Commission") must be dismissed from this action because its claims are barred by North Carolina's sovereign immunity. But, as the Special Master correctly concluded, the Commission may join the Plaintiff States' original action against North Carolina because it asserts the same claims and seeks the same relief as the States. That is the clear teaching of this Court's decisions in *Arizona* v. *California*, 460 U.S. 605 (1983) and *Maryland* v. *Louisiana*, 451 U.S. 725 (1981). North Carolina's opposing arguments all lack merit.

Second, the Special Master properly deferred any decision on the Plaintiffs' equitable claims, which need only be resolved if the Compact claims are rejected. North Carolina, however, asserts that the equitable claims brought by the States and the Commission should be dismissed as a matter of law because such claims are improper when a contract exists between the parties. It also asserts that the Compact is the sole source of potential liability among the parties. North Carolina is incorrect. First, equitable claims are proper when, as here, they are pursued as alternatives to any contract claims. Second, if this Court finds that the Compact does not provide a judicial remedy for North Carolina's breach, the Court will allow claims for relief based on North

Carolina's wrongs related to the Compact, such as the equitable claims presented here.

This Court should uphold the Special Master's recommendations on these points and overrule North Carolina's exceptions.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR THE COMMISSION'S CLAIMS.

North Carolina urges the Court to analyze this case as though the Commission alone had sued it. But, of course, the States of Alabama, Florida, Tennessee, and Virginia are also Plaintiffs in this original action. This Court has long recognized that when a non-State plaintiff joins States in suing a sister State, sovereign immunity does not bar its participation as long as the non-State plaintiff does not "seek to bring new claims or issues against" the defendant State. *Arizona* v. *California*, 460 U.S. at 614; *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. Here, the claims of the Plaintiff States and the Commission are identical, and the Commission is thus a proper party. This Court need go no further to adopt the Special Master's recommendation.

Even if this Court were to overrule these cases, however, the Commission still should not be dismissed. For purposes of this case, the Commission should be viewed as standing in the shoes of the States that it represents. Thus, its claims are not barred by sovereign immunity, and it is entitled to bring suit against North Carolina.

A. Sovereign Immunity Does Not Bar The Commission's Claims Because The Commission Does Not "Seek To Bring New Claims Or Issues Against" North Carolina.

As the Special Master correctly concluded, this Court's precedent establishes that "a non-State party may join a State or the United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report at 5-6.

In *Arizona* v. *California*, 460 U.S. at 614, an original action, both States opposed intervention by Native American Tribes, asserting that the Tribes' presence in the suit violated their sovereign immunity. This Court rejected that argument, reasoning that "[t]he Tribes do not seek to bring new claims or issues against the states." *Id.* "Therefore," the Court concluded, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* The Court was unanimous on this point. See *id.* at 642 (Brennan, J., concurring in part and dissenting in part) (joining the Court's opinion regarding intervention).

Similarly, in *Maryland* v. *Louisiana*, this Court addressed whether several pipeline companies would be allowed to intervene in an original action brought against Louisiana by several States and the United States. The action challenged a tax that Louisiana had levied on certain uses of natural gas brought into the State. As this Court explained, "those [pipeline] companies ha[d] a direct stake in th[e] controversy," and it therefore allowed the companies to intervene "in the interest of a full exposition of the issues." 451

U.S. at 745 n.21. The Special Master correctly noted that, in *Maryland*, "the pipeline companies . . . 'raised the same constitutional issues as those raised by the plaintiff States.'" Prelim. Report at 7.

Like the Tribes in *Arizona* and the pipeline companies in *Maryland*, the Commission here does not assert any claims against North Carolina that differ from those filed by the States. All Plaintiffs have stated legal claims for violation of the Compact, breach of contract, and other equitable claims and sought restitution and other damages. The Complaint was filed jointly and makes no distinction among the Plaintiffs by claim. See Prelim. Report at 6 ("The Plaintiffs in this case have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina."). No subsequent developments in this action suggest that the claims of the party States and the Commission have somehow diverged. As the Solicitor General explained:

> North Carolina suggests repeatedly that the addition of each new plaintiff creates a distinct 'claim' for Eleventh Amendment purposes, even if all of the plaintiffs assert that the defendant violated the same legal obligation and seek the same remedy. North Carolina cites no support for that proposition, and it is contrary to this Court's unanimous holding in [*Arizona* v. *California*, 460 U.S. 605 (1983)].

U.S. Brief at 14-15 (citation omitted)).

Furthermore, both the Commission and the party States raise breach of Compact claims. When North Carolina left the Compact, after taking $80 million dollars from its Compact partners, it harmed the Compact States as surely as it harmed the Commis-

sion. It deprived all member States of the chance to use those funds to work toward another facility in the Compact States, and it gave North Carolina an $80-million-dollar head start if it later chooses to site a facility for its own purposes. It also deprived States of access to the promised disposal facility, with resulting costs for building additional storage space, lost business opportunities, lost economic development, and increased risk to health, safety, and the environment in six states.

In attempting to undermine the import of this Court's precedent, North Carolina relies principally on *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). As the Special Master explained, these cases are easily distinguishable. See Prelim. Report at 10-13.

In *Pennhurst*, the United States and residents of a state school and hospital jointly sued the institution and various of its officials on both federal- and state-law claims and prevailed on the federal claims. On appeal, this Court ruled that the federal claims were not viable and remanded the case. See 451 U.S. 1 (1981). The court of appeals reaffirmed its prior decision based solely on the state-law claim.

The state-law claim, however, was not available to the United States, but only to the private plaintiffs (the residents of the institution). Thus, this Court again reversed the court of appeals. It explained that a "federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment" and concluded that "neither pendent jurisdiction nor any other basis of jurisdiction may override" a State's sovereign immunity. 465 U.S. at 121. But, critically, nothing in *Pennhurst* suggests that where, as here, an appropri-

ate party (a Plaintiff State) sues a State for breach of federal law, other parties making the same claim (the Commission) must be dismissed from that case. That is why this case is like *Arizona* v. *California* and unlike *Pennhurst*.

Similarly in *Oneida*, several Indian tribes had sued two New York counties in federal court. The counties, in turn, impleaded the State of New York, seeking indemnification. This Court reversed the court of appeals' determination that federal courts could exercise ancillary jurisdiction over the counties' indemnification claim, again explaining that "[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." *Oneida*, 470 U.S. at 251 (citing *Pennhurst*, 465 U.S. at 121). In *Oneida*, accordingly, no proper party had sued the State of New York. Here, of course, the Plaintiff States have properly filed claims against North Carolina.

In sum, the private plaintiffs in *Pennhurst* and *Oneida* made claims that were separate and apart from any claims made by a proper party. Here, the Commission has raised neither any claim separate from those of the Plaintiff States nor any claim that is supported only by supplemental jurisdiction. *Pennhurst* and *Oneida* are thus neither analogous nor instructive here.[1] As the Special Master correctly

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[1] The notion that *Pennhurst* somehow overruled or cast doubt on *Arizona* is implausible. *Arizona* was decided in March 1983; *Pennhurst* was decided in January 1984, less than ten months later, by the same five-Justice majority, which does not mention *Arizona*. Nor has any subsequent decision in the *Arizona* case revealed concerns with the Tribes' continuing participation. *See Arizona* v. *California*, 530 U.S. 392, 399 (2000); 547 U.S. 150, 151 (2006).

concluded, those cases "simply underscore the limitation implicit in those decisions. If . . . a State has already asserted an appropriate claim against a State, then permitting a private party with a stake in the outcome to assert the *same* claim does not infringe on the State's Eleventh Amendment immunity." Prelim. Report at 13.

North Carolina next asserts that if this Court's *Arizona* and *Maryland* decisions remain good law, they "reflect[] an improperly narrow conception of the Eleventh Amendment" and "cannot be reconciled" with other decisions of this Court, specifically *Alden* v. *Maine*, 527 U.S. 706 (1999). North Carolina's Exceptions at 35-36. It is unclear whether North Carolina intends to argue that *Arizona* and *Maryland* "have been" or "ought to be" overruled, but in either case, North Carolina's argument is not persuasive.

Neither *Alden* nor any other case purports to overrule either *Arizona* or *Maryland*. The opinions in *Alden* do not even mention these cases. This Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

As noted by the Solicitor General in her *amicus* brief, North Carolina makes no recognizable argument that *Arizona* ought to be overruled. It does not advance any of the usual considerations this Court takes into account when it contemplates the overturning of a long-standing precedent. U.S. Brief at 12-13.

Nor should *Arizona* be overruled. It did not create an unworkable rule. See *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854-55, (1992). There has been no change of factual circumstances to justify a change in the law. *Id.* The decision was not closely divided;

it was unanimous. *Payne* v. *Tennessee*, 501 U.S. 808, 828-29 (1991). And compacts have been drafted with the expectation that a Compact Clause entity, together with member States, would be permitted to bring suit against a breaching State. See *id.* at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."). In short, *Arizona* governs here, as the Special Master found.

Finally, North Carolina contends that the claims of the party States and the Commission are not in fact identical. Specifically, North Carolina maintains that the money delivered to North Carolina belonged to the Commission, and not to the party States, making the claims based on that money different.

Initially, this argument, like the one before it, asks this Court to reject *Arizona*. *Arizona* held that the sovereign immunity question depends on the claims that each party *pleads*, not on the ultimate validity of those claims. Thus, as long as a party does "not seek to bring new claims or issues against the states," its claims do not implicate the Eleventh Amendment. *Arizona*, 460 U.S. at 614.[2] Here, all parties bring claims for breach of contract, breach of Compact, restitution, etc. The elements of the claims are the same for all Plaintiffs. In reality, North Carolina is arguing that the States *are less likely than the Commission to succeed on these identical claims.* North Carolina's Exceptions at 39-55. That is beside the point for purposes of this jurisdictional argument. All Plaintiffs bring the same claims.

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[2] The non-State party's claims need not even be precisely identical, as *Arizona* recognized. 460 U.S. at 612 (noting that the Tribes' motion to intervene made "claims for additional water rights" to reservation lands).

Although North Carolina's assertion about the ownership of the money provided to it is legally irrelevant, it is also wrong. North Carolina's characterization of the money's ownership is inconsistent with the terms of the Compact, and fundamentally misapprehends both the States' interest in the funds held by the Commission and the nature of the relationship between the Commission and the party States.

Fundamentally, the $80 million that North Carolina took belonged to the party States. The money was not transferred to the Commission directly from the State's treasuries; but the States had explicit, legally cognizable interests in the money. First, the Compact expressly defines the money the Commission holds as the money of the party States. Art. 4(H)(2)(b). Second, the Commission is the agent of the party States, and it was in that capacity that the Commission collected and disbursed the funds. The money was thus at all times under the control of, and used at the direction of the party States. It was in all relevant respects the States' money.

In fact, the money came from fees and surcharges imposed on generators that disposed of their waste at the Southeast Compact's regional waste disposal facility in Barnwell County. As such, even though it was gathered through various funding mechanisms, these funds flowed to the Commission pursuant to Article 4(H)(2) of the Compact, which requires "[e]ach state hosting a regional disposal facility [to] annually levy special fees or surcharges on all users of such facility." Although South Carolina, as host State, was responsible for collecting the fees and surcharges and remitting them to the Commission, Art. 4(H)(3), the Compact expressly provides that the total amount collected in fees and surcharges "must represent the

financial commitments of all party states to the Commission," Art. 4(H)(2)(b), regardless of the specific mechanism utilized.[3]

Thus, under the Compact, the money that South Carolina collected in fees and surcharges represented the "financial commitments" of all the party States to the Commission. All the party States, including North Carolina, agreed to this contractual term and it is binding.

If more were needed, the Commission actually collected and disbursed the money in its role as the agent of the party States, which the Compact makes clear. It is well-settled that when the agency requirements are met, an association will be deemed the agent of its members and the property it holds is the property of its principals. See *Smith* v. *NCAA*, 139 F.3d 180, 188 (3d Cir. 1998) (association is agent of its member institutions), *rev'd on other grounds*, 525 U.S. 459 (1999); accord *Bot* v. *Comm'r*, 353 F.3d 595, 600-01 (8th Cir. 2003); *Horner* v. *Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994); *S. Pac. Transp. Co.* v. *Continental Shippers Ass'n*, 642

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[3] As North Carolina points out, the Compact provides several mechanisms for the Commission to initiate the levying and collecting of those fees. North Carolina's Exceptions at 43-44. Regardless of the mechanism the party States used, however, the Compact expressly states that "the total" amount of all "fees or surcharges" levied on "all users of [the regional disposal] facility" "represent the financial commitments of all party states." Art. 4(H)(2) & (2)(b). All of the money the Commission collected was raised by levying fees against those entities that used the facility. Whether the party States collected the money through article 3(B) access fees or out-of-region access fees, article 4(H) is clear: "the *total*" money collected and delivered to the Commission through "fees or surcharges *on all users* of such facilit[ies]" is the money of the party States. Art 4(H) (emphasis added).

F.2d 236, 238 (8th Cir. 1981). Indeed, North Carolina concedes that any money conveyed by the party States' agent may be sought from North Carolina in restitution. North Carolina's Exceptions at 42 (referencing the "black-letter rule that a plaintiff may seek restitution only of moneys paid by the plaintiff itself (directly or *through a proper legal agent*)" (emphasis added)).

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006). As a matter of Compact law, the party States control the Commission. See Art. 4(A) ("The Commission shall consist of two voting members [Commissioners] from each party state to be appointed according to the laws of each state."); Art. 4(B) ("No action of the Commission shall be binding unless a majority of the total membership [Commissioners] cast their vote in the affirmative . . . unless a greater than majority vote is specifically required . . . .").

It is undisputed that the Commission was acting on behalf of the party States when it collected and disbursed the funds. The Commission was acting pursuant to its role under the Compact to "seek to ensure that [North Carolina's] facility [was] licensed and ready to operate as soon as required." Art. 4(E)(6). Specifically, the party States instructed the Commission to collect money in order to aid North Carolina, to raise the funds through particular mechanisms, and to deliver the money to North Carolina. See, *e.g.*, Feb. 9, 1988 Resolution (App. 63-65); Summary De-

scription of Capacity Assurance Charge (App. 71-74); Nov. 15, 1990 Minutes of Commission (App. 97-100).

Under these circumstances, the Commission was plainly the agent of the party States. *Central States Trucking Co.* v. *J.R. Simplot Co.*, 965 F.2d 431 (7th Cir. 1992), illustrates this point. In that case, the Seventh Circuit held that the Perishable Shippers Association ("PSA") was the agent of all of its member companies. The agreement between the member companies and the PSA did not mention agency, but it established a Board of Directors with representatives from the various member companies. The Board was given authority by the PSA's by-laws to control the actions of the PSA, which received money from the various member companies and paid money out to other businesses. *Id.* at 434. The court held that the organization was the agent of the various member companies. *Id.* The relevant inquiry was whether there was an agreement "'by one person to another that the other shall act on his behalf and subject to his control.'" *Id.* at 433 (quoting *S. Pac. Transp.*, 642 F.2d at 238). The agreement between the member companies and the PSA demonstrated this control and therefore created an agency relationship.

The same legal conclusion is warranted here. The Compact establishes that the Commission will act under the control of the Commissioners, who are representatives of the party States. See Art. 4(A) & (B). Further, the Commission is acting for the benefit of the party States when it supports and assists in funding the establishment of a regional facility. Art. 4(E)(6) (Commission was tasked, by the party States, with "seek[ing] to ensure that [North Carolina's] facility [was] licensed and ready to operate as soon as required."). Therefore, when the Commission col-

lected funds from the party States and distributed those funds to North Carolina, it acted as the agent of the party States. Any benefit it conferred as an agent on North Carolina was a benefit conferred by the party States. See *Packet Co.* v. *Clough*, 87 U.S. (20 Wall.) 528, 540 (1874) ("whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal"); *accord* 3 Am. Jur. 2d *Agency* § 2 (2002).[4]

North Carolina contends that the Commission cannot be the agent of the party States (i) because the Compact explicitly states that the Commission is a "separate" "legal entity" and that the "[l]iabilities of the Commission shall not be deemed liabilities of the party states," Art. 4(M)(1), and (ii) because the Com-

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[4] Defendant incorrectly argues that the Commission should be viewed as a corporation and that as shareholders of the "corporation," the party States cannot "seek[ ] restoration of funds belonging to the association (or corporation) itself." North Carolina's Exceptions at 54. But, the party States do not seek restitution of the Commission's funds, they seek restitution of their own funds that were held by their agent, the Commission. And, even if the Commission could somehow be viewed as a corporation and the States its shareholders, when agency principles are met, shareholders are deemed principals and the corporation is their agent. *See, e.g., Comm'r* v. *Bollinger*, 485 U.S. 340, 344-50 (1988) (because agency principles were met, the shareholders were principals and the corporation their agent); *see also Smith*, 139 F.3d at 188 (association is agent of its member institutions). And money held by the agent is the principals' money which the principals may seek through restitution. *See, e.g., Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (money held in agency account and managed by agent is the "private property" of the principal); 5 *Collier on Bankruptcy* ¶ 541.06[1][a] (15th ed. 1999) (In an agency relationship, "the title to the property remains in the . . . principal, and the . . . agent holds the property under the . . . agency for the owner's benefit.").

missioners, not the party States, control the Commission. North Carolina's Exceptions at 51-52. These arguments are incorrect and misunderstand both agency law and the Compact.

First, North Carolina argues that because the Commission and the States are separate legal entities the Commission cannot be the agent of the States. By law, however, an agent is always a legal entity separate and distinct from the principal.[5] *Restatement (Third) of Agency* § 1.01, cmt. *c* ("Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal."). To be the States' agent, the Commission had to be a separate legal entity.

The fact that the Commission is capable of acting on its own behalf – as, for example, when it hires staff or leases office space – does not make it incapable of acting on behalf of the party States. See *id.* § 1.01, cmt. *b* ("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons .... Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not.").

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[5] This Court's reasoning in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), is not to the contrary. In *Dole*, this Court recognized that even if corporate formalities were applied, an entity could be an agency or instrumentality of a foreign state. *Id.* at 474 ("the statutory language ... grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state,'" thus indicating that "Congress intended statutory coverage to turn on formal corporate ownership").

North Carolina also argues that the Compact language providing that the Commission's liabilities "shall not be deemed liabilities of the party states," Art. 4(M)(1), precludes the Commission from acting as an agent of the States. This argument is based upon Defendant's erroneous assumption that principals *must* share liability with their agents or no agency relationship exists. This proposition is unsupported by agency law. Agency turns on whether parties manifest assent that one will act on behalf and under the control of another party, not on considerations of liability. *Restatement (Third) of Agency* § 1.01. In fact, it is well-established that certain agency relationships lead to an imputation of liability between the agent and the principal, while other agency relationships do not.[6] The question of vicarious liability is thus irrelevant to whether the States intended the Commission to have power to act as their agent.[7]

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[6] For example, under the doctrine of *respondeat superior*, an employer is vicariously liable for torts committed by his employees (who are generally agents of their employer) acting within the scope of their employment. *See Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment."). By contrast, an employer is not vicariously liable for torts committed by independent contractors (who are also often agents of their employers). *See Restatement (Second) of Torts* § 409 (1965); *id* at cmt. *a* ("an agent may be either an independent contractor or a servant"); *Wilson* v. *Good Humor Corp.*, 757 F.2d 1293, 1301 (D.C. Cir. 1985) ("[A]n employer of an independent contractor is not liable for [torts] of the contractor.").

[7] Defendant also claims that "the notion of an agent possessing punitive powers over its principal is completely inconsistent with basic tenets of a principal/agent relationship." North Carolina's Exceptions at 51. Defendant fails to quote any of these

Second, North Carolina argues that the Commission is not the agent of the party States because it is not controlled by those States. However, as discussed previously at 11, the Commission can only act by a majority or super-majority vote of the Commissioners, who are representatives of the party States. See Art. 4(A) & (B). The Commissioners are "appointed" by each State, "according to the laws of each state," Art. 4(A), and act under the direction of their respective governors and other state leaders. In addition, the record establishes that the Commissioners represented the party States. See, *e.g.*, M. Mobley, Tennessee Commissioner, Deposition Tr. at 250 (App. 561) ("I'm representing the state of Tennessee down the line. I mean, I could care less what the Commis-

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"basic tenets" and, indeed, agents possessing punitive powers over their principals is both consistent with agency law and a common occurrence. Because agency is determined by assent and control, if principals agree that their agent shall possess punitive powers as to them, as the Compact does here, the agent has such powers. *See* Art. 7(F) (party States confer on Commission authority to sanction). In addition, an agent of multiple principals regularly has both fiduciary duties to each principal and is authorized, by consent of the principals, to take punitive action against a principal. For instance, arbitrators are considered agents of the parties before them, *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001); *Farulla* v. *Ralph A. Freundlich, Inc.*, 279 N.Y.S. 228, 241 (N.Y. Sup. Ct. 1935) ("Arbitrators are agents of both parties. Hence, their acts are considered as the acts of the parties themselves; and a balance found by the arbitrator is considered as a balance struck by the parties on an account stated by themselves.") (quoting *Hays* v. *Hays*, 23 Wend. 363, 366-67 (N.Y. 1840)), and are routinely empowered by arbitration agreements to use punitive powers over their principals, *see, e.g., Int'l Ass'n of Heat & Frost Insulators, Local Union 34* v. *Gen. Pipe Covering, Inc.*, 792 F.2d 96, 100 (8th Cir. 1986) (arbitrator given power to "impose fines or other penalties" for violations of an agreement) (internal quotation marks omitted).

sion wants because the Commission is nothing but each commissioner sitting down and saying, 'I'm representing this state and I'm here to do the deal.'"); K. Whatley, Alabama Commissioner, Deposition Tr. at 154 (App. 565); H. Wheary, Virginia Commissioner, Deposition Tr. at 227-28 (App. 569). Mr. Setser, the deponent on behalf of the Commission, also testified that "the only thing that gives life to the Commission are the party states, so the Commission was acting as the agent and suing on behalf of the party states." Setser Deposition Tr. 101 (Supp. App. 500).

It is clear that the Commission acted under the control of the party States. See *Cent. States Trucking*, 965 F.2d at 434 (Association's "members had the ability to control the association," via a "Board . . . made up of representatives of its members" and therefore association was members' agent).

North Carolina attempts to avoid this conclusion by arguing that because the Compact requires a majority vote, no *single* State controls the Commission. North Carolina's Exceptions at 52-53. But, an entity controlled by multiple parties may nonetheless be an agent. See, *e.g.*, *Restatement (Third) of Agency* § 3.16 ("Two or more persons may as coprincipals appoint an agent to act for them in the same transaction or matter."). And, an agent can be controlled by its principals even when the principals direct the agent through a non-unanimous decision process.[8] The

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[8] For instance, in partnerships, each partner is a principal and agent. *See Latta* v. *Kilbourn*, 150 U.S. 524, 543 (1893) ("By the well-settled law of partnership each member of the firm is both a principal and an agent."); *Grassmueck* v *Am. Shorthorn Ass'n*, 402 F.3d 833, 841 (8th Cir. 2005) (same). When the requisite number of the partners vote for an action, as set-out by an agreement, the partnership must comply. *See, e.g., Trump* v.

relevant inquiry is whether, when the principals direct – through whatever form they have elected – the agent must obey. Here the Commission must abide by the Compact, which requires that when a majority (or, for certain decisions, a super-majority) of party State Commissioners vote for an action, the agent-Commission must comply.[9]

Because agency principles are met here, the Commission is the agent of the party States; and as North Carolina recognizes, a party may seek restitution for money conveyed by its agent. North Carolina's Exceptions at 42. The party States therefore, may properly seek restitution of the $80 million conveyed by the Commission.

Refco Props., Inc., 605 N.Y.S.2d 248 (N.Y. App. Div. 1993) (partnership agreement requirement that 65% of partners agree to management decisions); *Heritage Co. of Massena* v. *La Valle*, 605 N.Y.S 2d 613, 614 (N.Y. App. Div. 1993) (partnership agreement provision requiring affirmative vote of 75% of partnership interests).

[9] North Carolina also argues that the "resolutions" in question did not "state[] or suggest[] . . . that the Commission was providing these funds to North Carolina in an agency capacity." North Carolina's Exceptions at 52. This omission is not material; as a matter of law, "[w]hether a relationship is characterized as an agency in an agreement between parties . . . is not controlling." *Restatement (Third) of Agency* § 1.02. Indeed, "[t]he relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act." *Restatement (Second) of Agency* § 1, cmt. *a* (1958); *see also Interocean Shipping Co.* v. *Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975) ("Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done."). The Commission was under the control of the party States and carried out its role on behalf of the party States. Thus, the Commission acted as the agent of the party States when it collected the funds at issue.

There is no difference between the Commission's claims and those of the party States. North Carolina's attempt to find such a difference in the parties' relationships to the funds provided to North Carolina is both legally irrelevant and wrong – all Plaintiffs have the same causes of action and seek the same remedies from North Carolina.

In sum, under this Court's established precedent, the Commission is a proper party because its claims are identical to those of the plaintiff States.

B. North Carolina May Not Assert Sovereign Immunity Against The Commission.

The Commission is not bringing independent claims against North Carolina. If this Court agrees, it need not address the Commission's alternative argument that its claims against North Carolina are not barred by sovereign immunity, for two reasons. First, a Compact Clause entity can sue a member State. It does not offend a State's sovereign immunity to defend an original action brought before this Court by an interstate compact commission that represents its sovereign state members.

Second, North Carolina waived its sovereign immunity as against the Commission when it signed the Southeast Compact, which includes a provision allowing the Commission to stand in the shoes of its party States and bring suit on their behalf. Art. 4(E)(10) (authorizing the Commission "[t]o act or appear on behalf of any party state or states . . . before . . . any court of law").

1. Compact Clause entities are not generally precluded from suing States.

North Carolina argues that "a Compact Clause entity is not a State for 'Eleventh Amendment pur-

poses,'" North Carolina's Exceptions at 28-29 (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979)). From this premise, North Carolina argues that the Commission cannot sue a State. There are several problems with this argument.

First, neither *Hess* nor *Lake Country* involved a Compact Clause entity bringing suit against a State. In fact, neither case included a State party. Both cases dealt solely with the question of whether a Compact Clause entity itself could assert sovereign immunity – an issue not relevant here. See *Hess*, 513 U.S. at 39 (Compact Clause entity was "not entitled to Eleventh Amendment immunity from suit in federal court"); *Lake County*, 440 U.S. at 402 (same). Nothing in the analysis of these cases suggests that Compact Clause entities cannot sue States, particularly where as here the Compact provides that the entity stands in the shoes of its sovereign member States.

Second, neither case purported to establish a general rule that Compact Clause entities do not share in their member States' sovereign immunity. Instead, both cases relied on fact-specific inquiries to determine whether the specific Compact Clause entities at issue could assert sovereign immunity. The Commission here is unlike the compact entities in *Hess* and *Lake County*. It is composed solely of members representing States, rather than smaller units of government or private parties. Compare Art. 4(A), with *Hess*, 513 U.S. at 44.[10]

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[10] Moreover, assuming *Hess* and *Lake Country* provide the relevant legal framework for determining whether the Commission stands in for a member State for these purposes, North

More generally, this Court has suggested that original actions are "fundamentally different," and less amenable to the sovereign immunity defense because under the States "*cannot* form an interstate compact without" congressional consent. *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); see U.S. Const. art. I, § 10, cl. 3. It logically follows from the nature of an interstate Compact, that a Compact Clause entity should be able to sue a State on behalf of a sister State in order to enforce the underlying compact. In fact, the preeminent federal practice treatise describes it as a "commonsense proposition that the Eleventh Amendment does not bar an interstate commission created by Congress from enforcing the terms of an interstate compact [and] bringing suit against a signatory state in federal court." 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3524, at 251 (3d ed. 2008).

The only case to have addressed the question in detail involved the Central Interstate Low-Level Radioactive Waste Compact. See *Entergy Ark., Inc.* v. *Nebraska*, 68 F. Supp. 2d 1093, 1100 (D. Neb. 1999), *aff'd in relevant part and rev'd in part*, 241 F.3d 979 (8th Cir. 2001). Surveying the origins of the Compact Clause and the history of its use, that court concluded that the State defendant was not shielded by sovereign immunity. *Id.* The court reasoned that a compact allows a State to act in an area in which it would otherwise be under a constitutional prohibition, so

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Carolina does not apply the factors utilized in those cases, let alone show that the Commission does not qualify. Both *Hess* and *Lake Country* relied on myriad factors – board composition, funding, traditional local control of the regulated area – in determining that the entities at issue did not enjoy sovereign immunity. *See Hess*, 513 U.S. at 44-51; *Lake Country*, 440 U.S. at 401-02.

that when Congress authorizes a compact, it gives States a "'gratuity.'" *Id.* at 1099; see *Coll. Sav.*, 527 U.S. at 686. Consequently, Congress has the power to demand that States cede their immunity in the relevant sphere:

> When the States engage in activities not specifically restricted by the Constitution, they generally enjoy Eleventh Amendment immunity. However, if they enter into an arena from which they were, at the Founding, specifically barred, then quite different rules apply. Those rules come with the consent ("gratuity" in the words of Justice Scalia) of Congress. In that circumstance, the States must accept the controls placed upon them by Congress. Therefore, in a case involving a suit brought by a Compact Clause entity specifically authorized to sue a signatory state, the Eleventh Amendment is not applicable, since, at the Founding, the state had no right whatever to pursue the object of the compact. Simply put, a signatory state has no immunity from suit by a Compact Clause creation because that state had no sovereignty (power) over the enforcement mechanism chosen by Congress.

Entergy Ark., 68 F. Supp. 2d at 1099. Put differently, the States had sovereign immunity from suit before entering the United States, at which point they impliedly consented to suit by the Nation they had joined. *Monaco* v. *Mississippi*, 292 U.S. 313, 328-29 (1934). Similarly, when the member States entered the Southeast Compact, they impliedly consented to suit by the Commission created by that Compact.

As *Hess* makes plain, a Compact's status as a hybrid of state and federal systems makes it unique,

and uniquely associated with States, the federal government, and federal courts:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court. *As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.* Again, the federal tribunal cannot be regarded as alien in this cooperative, trigovernmental arrangement.

Hess, 513 U.S. at 41-42 (emphasis added) (footnote omitted). A compacting State cannot complain that its dignity and integrity are compromised by a suit in the Supreme Court of the United States by a duly-authorized representative of its sister States to which it made – and failed to fulfill – contractual commitments.

2. North Carolina consented to suit by the Commission.

In the alternative, the text of the Southeast Compact is best read to provide that North Carolina waived any immunity it allegedly enjoyed. Under the Southeast Compact, the Commission is authorized upon written request of the commissioners of a State or States "[t]o act or appear on behalf of any party state or states . . . before . . . any court of law." Art. 4(E)(10). The Commission received such a request from the Commissioners of the States of Alabama, Florida, Tennessee, and Virginia. Consequently, the

Commission was authorized by those States to represent them in this Court.

This language is even more clearly viewed as a waiver when read in conjunction with the party States' grant to the Commission of punitive powers over the party States. See Art. 7(F) ("Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state."). In light of Article 7(F), any State signing the Compact would have understood that Article 4(E)(10) contemplates that the Commission might file suit against a party State in certain circumstances, including those presented in this action.

The Eighth Circuit addressed an analogous argument during the *Entergy* litigation and concluded that Nebraska had waived any immunity:

> The language in Article IV.e supports the Commission's argument that by entering into the Compact, Nebraska consented to action by the Commission to enforce the Compact in federal court: "[t]he Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact." We conclude that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its contractual obligations.

Entergy Ark., Inc. v. *Nebraska*, 210 F.3d 887, 897 (8th Cir. 2000). As the panel explained, "the Compact is a

Congressionally sanctioned agreement which authorizes, and indeed requires, the Commission to enforce the obligations it imposes upon party states." *Id.*

This analysis applies to the Compact text at issue here. North Carolina waived its sovereign immunity from suit by the Commission when it ratified the Southeast Compact and vested the Commission with the authority to represent member states in "any court of law." Art. 4(E)(10). The States entering into this Compact would have known that the Commission would be able to enforce the commitments of the member States under the Compact.

* * * *

In sum, the Commission is an appropriate party because it does not bring any claims separate from those brought by the Plaintiff States. This Court need go no further to deny North Carolina's exception to the Special Master's recommendation that this Court find that the Commission is a proper Plaintiff. If the Court decides, however, that the Commission's claims might be somehow different from those of the States, it nonetheless should not dismiss the Commission. North Carolina is not entitled to sovereign immunity from the Commission's claims here.

II. THIS COURT MAY HOLD NORTH CAROLINA LIABLE FOR UNJUST ENRICHMENT, PROMISSORY ESTOPPEL, AND MONEY HAD AND RECEIVED.

North Carolina's second exception addresses Plaintiffs' three equitable causes of action for unjust enrichment, promissory estoppel, and money had and received. In the Special Master's Second Report, he correctly concluded that any determination of these claims is "premature because several factual and

legal questions remain to be decided." Second Report at 44.

Plaintiffs assert the equitable claims only in the alternative, to be pursued if this Court decides against Plaintiffs on the breach of Compact claims. But North Carolina argues that the equitable claims can be dismissed now, as a matter of law, both because such claims are improper when a contract exists between the parties and because the Compact is the sole source of liability between the parties. North Carolina is incorrect on both points. First, equitable claims are proper when sought as an alternative to contract claims, as is the case here. Second, when a Compact does not provide a judicial remedy, the Court allows claims, such as equitable claims, that are related to the Compact.

North Carolina first argues that Plaintiffs' equitable claims should be dismissed because "'there can be no claim for unjust enrichment when an express contract exists between the parties.'" North Carolina's Exceptions at 58 (quoting *Albrecht* v. *Comm. on Employee Benefits*, 357 F.3d 62, 69 (D.C. Cir. 2004)). Because Plaintiffs seek equitable remedies solely as an alternative to their contract remedies, North Carolina's repetition of the common law rule is beside the point. Plaintiffs are not arguing that they are entitled to equitable remedies *in addition* to their contractual remedies, but that their equitable claims arise if this Court determines there are no enforceable contractual claims. And, the law is clear that equitable claims, such as unjust enrichment, are available as alternatives to a claim for breach of contract. 26 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 68:1, at 5 (4th ed. 2003) ("recovery based on unjust enrichment [is] allowed by the courts as [an] alternative remed[y] to

an action for damages for breach of contract"); see also *id.* § 68:5, at 58 ("Where the plaintiff has no alternative right on an enforceable contract, the basis of the plaintiff's recovery is the unjust enrichment of the defendant.").

The opinion that North Carolina quotes, *Albrecht* v. *Committee on Employee Benefits*, 357 F.3d 62, 69 (D.C. Cir. 2004), does not hold otherwise. In *Albrecht*, the court rejected appellant's claim because it "turn[ed] *entirely* on the terms of a contract." *Id.* (emphasis in original); see *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 509 (1959) ("in the federal courts equity has always acted only when legal remedies were inadequate"). Here, in contrast, it is undisputed that $80 million was conveyed to North Carolina in reliance on the contract, not pursuant to an express term of the Compact. It is also undisputed that the Compact provides that the "Commission is not responsible for any costs associated with . . . the creation of any facility." Art. 4(K)(1). If this Court finds that the Plaintiffs are not entitled to contract remedies, Plaintiffs will be entitled to equitable remedies for providing $80 million to North Carolina in reliance on the Compact. See *Klein* v. *Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir. 1996) ("Normally, when an express contract exists between the parties, unjust enrichment is not available as a means of recovery. However, when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice.") (citation omitted).

Second, North Carolina argues that the party States' equitable claims cannot survive because the Compact is the "sole and exclusive source of North Carolina's obligations to the other party States." North Carolina's Exceptions at 59. This Court's deci-

sion in *Texas* v. *New Mexico*, 462 U.S. 554 (1983) ("*Texas I*") demonstrates that North Carolina is wrong. There this Court stated: "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-70.[11] Thus, when this original action returned to the Court in *Texas* v. *New Mexico*, 482 U.S. 124 (1987) ("*Texas II*"), this Court held that money damages were not foreclosed even where the Compact did not expressly allow for them. *Id.* at 130-31. If this Court finds that the party States have no express contract claim for relief for breach of contract, North Carolina argues that then there can be no relief of any kind for its wrongs related to the Compact. But this is the exact outcome *Texas I and Texas II* preclude – the Court awarded money damages that the compact did not expressly provide.

North Carolina does not point to any "indication" that this Compact forecloses judicial relief not specified in the Compact. North Carolina argues that because the Compact states that it is the "instrument and framework" for a joint disposal effort, it must be the "sole legal 'instrument and framework.'" North Carolina's Exceptions at 57 (quoting Art. 1). But it is

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[11] If North Carolina is arguing that because the parties to the Compact are sovereigns, the Compact is the sole source of their rights and obligations, North Carolina is incorrect. States do not enjoy sovereign immunity as to each other, *see, e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 182 n.9 (1982), and thus must abide by principles of common law, just like any other party in a contract dispute. *Cf. Franconia Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) ("Once the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity.").

North Carolina that is adding the words "sole legal" before the words "instrument and framework"; the Compact does not so state. The Compact does not preclude the Plaintiff States from seeking relief not expressly provided in its terms for wrongs related to the Compact.

North Carolina also cites the Compact provision that reserves each States' rights as to the others, asserting that this means that the Compact is "explicit" that its obligations "are the sum total of each States' obligations to the others." *Id.* Compact Article 3 states simply that "[t]he rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit, or abridge those rights." Art. 3. North Carolina has no sovereign prerogative to prevent other States in the Compact from bringing equitable claims against it. States do not enjoy sovereign immunity as to each other. See *South Dakota* v. *North Carolina*, 192 U.S. 286, 315 (1904). In all events, Article 3 preserves State rights, but does not authorize States to escape their legal obligations to sister States under the Compact or in equity.[12]

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[12] The Compact *does* contain one "explicit provision" that judicial relief is precluded. *Texas I*, 462 U.S. at 569-70. The Compact is clear that "[t]he Commission *is the judge* of the . . [party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). Thus the Commission is given the exclusive power to determine the party States' compliance with the terms of the Compact. *See, e.g., Texas I*, 462 U.S. at 569 ("If it were clear that the Pecos River Commission was intended to be the exclusive forum for disputes between States, then we would withdraw."). However, beyond that determination, the Compact allows courts to determine the applicable remedy, as well as any claims in equity related to the Compact.

Plaintiffs' equitable claims are alternative claims. Thus, if this Court sustains Plaintiffs' exceptions and allows Plaintiffs' contract claims, it will not need to decide the equitable claims. Moreover, as the Special Master correctly determined, the Plaintiffs' equitable claims rest on legal and factual determinations that he has not made, and they cannot be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, North Carolina's exceptions should be overruled.

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